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NO. 83-854

in the

Supreme Court

of the

United States

October Term, 1983

PHILIP G. NOURSE, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida,

Petitioner,

vs.

STATE OF FLORIDA, EX REL DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DAVID PINGREE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI AND/OR PETITION FOR WRIT OF PROHIBITION TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

Philip G. Nourse, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida
Room 309, St. Lucie County Courthouse
Fort Pierce, Florida 33450
(305) 464-8904
Counsel/Petitioner

QUESTION PRESENTED FOR REVIEW

Is a trial judge required to protect the constitutional rights of a 13 year old runaway girl against a state agency that exposes the child to serious physical harm and/or death, and if so, does a trial judge who retains jurisdiction of the child have the right under the 8th and 14th Amendments of the United States Constitution to require the committed child to be housed in a safe and secure facility until she is rehabilitated?

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REFERENCE TO THE REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The Order committing the child to the Department of Health and Rehabilitative Services of March 4, 1983, by Circuit Judge Philip G. Nourse is appended to this petition on Page A.

The Order granting prohibition against said Judge by the District Court of Appeal, Fourth District, dated September 14, 1983, is appended to this petition on Page D.

The Order denying Appeal and/or Petition for Common Law Writ of Certiorari and/or Petition for Writ of Prohibition entered by the Supreme Court of the State of Florida on the 28th day of October, 1983, is appended to this petition on Page I of the Appendix.

CONCISE STATEMENT OF THE GROUNDS UPON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

Jurisdiction of the United States Supreme Court is invoked to review the Judgment Order of the Supreme Court of the State of Florida, dated October 28, 1983, affirming the Order of the District Court of Appeal, Fourth District, dated September 30, 1983.

The Supreme Court's jurisdiction to review this matter comes from the inherent authority of the Supreme Court of the United States to issue its extraordinary writs and from 28 United States Code, Section 1257, that states in part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed as follows:
>
> (3) By Writ of Certiorari ...where any title, right,

> privilege or immunity it specially set up or claimed under the Constitution ... of the United States."

and from Rule 17, of the Supreme Court of the United States that states in part:

> "1. A review on writ of certiorari...will be considered...
> (C) When a State Court ... has decided an important question of federal law which has not been but should be, settled by this Court, or had decided a federal question in a way in conflict with applicable decision of this court."

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES, ORDINANCES AND REGULATIONS INVOLVED

The XIV Amendment of the United States Constitution, in part, recites:

> "...nor shall any state ...deny to any person within its jurisdiction its equal protection of its laws."

The XIV Amendment to the United States Constitution, in part, recites:

> "Excessive bail shall not be required...nor cruel and unusual punishments inflicted."

Florida Statutes, Chapter 39.001 (2)(b) Short title, purposes, and intent, states as follows:

> "To assure to all children brought to the attention of the courts, either as a result of their misconduct or because of neglect or mistreatment by those responsible for their care, the care, guidance,

and control, preferably in each child's own home, which will best serve the moral, emotional, mental, and physical welfare of the child and the best interests of the state." (Emphasis supplied.)

Florida Statutes, Chapter 39.01(21), states as follows:

'"Legal Custody' means a status created by court order ...which vests in a agency...the right and DUTY to protect...him..." (Emphasis supplied.)

Florida Statutes, Chapter 39.01(26), states as follows:

"'Neglect' occurs when legal custodian...deprives a child of, or allows a child to be deprived of...shelter...permits a child to live in an environment when such deprivation or environment causes the child's physical...health to be significantly impaired or to be in danger of being significantly impaired."

CONCISE STATEMENT OF THE CASE

This Petition for Certiorari and/or Prohibition involves an issue of first impression for the Honorable Court, namely as to whether or not a trial judge in committing a 13 year old runaway (over whom jurisdiction is retained) to a state agency can require the state agency to protect the child from death and/or destruction.

Phrased differently, this case found the Petitioner, Philip G. Nourse, Circuit Judge, hereinafter referred to as "the Judge", ordering the Respondent, the Florida Department of Health and Rehabilitative Services, hereinafter referred to as "HRS" to confine a 13 year old runaway girl in a secure facility while HRS was doing their job of rehabilitating the child.

Reducing the case to more specific facts, an order was entered on March 4, 1983, committing Wendy Shaw to HRS for run-a-way rehabilitation since she was a dependent child. This 13 year old, well-built, attractive female child had run away from home at least 13 times and had advised the social worker at the disposition hearing that she was going to continue to run away from home and/or from any institution to which the court would commit her. The case was, and is, very frustrating. The parents agreed to the commitment order (see Appendix, Exhibit "A". The local social workers agreed to the commitment order.

The trial court had ordered HRS to put a fence around the child's camp so the child could not escape to wander

the highways of Florida and be picked up by some pervert to be raped, butchered and thrown into a ditch to die. It is not uncommon in this area of Florida for children to be raped, butchered and thrown into a ditch to die. The trial court wanted no more "Adam Walsh's" in this or the adjoining counties (or anywhere else for that matter), nor did the court want another Jonestown, Guana to develop in Florida.

While the local HRS social workers had no other solution to this case, the "headquarters' staff" based in the Capitol of Florida did not like the idea of having to protect the child from herself and sued this Judge in the District Court of Appeal of the State of Florida, Fourth District, and obtained a Writ of Prohibition against the Judge (see Appendix

"D"). The Judge "appealed" and "petitioned" the Florida Supreme Court for a Writ of Prohibition and/or Certiorari against the District Court of Appeal, Fourth District, which was denied. (See Appendix, Exhibit "I".) This Petition to the Supreme Court of the United States for a Writ of Certiorari and/or Prohibition is directed to the Florida Supreme Court and the District Court of Appeal, Fourth District, and seeks an order prohibiting the Florida Supreme Court, the District Court of Appeal, Fourth District, and HRS from interfering with the trial court's duty to protect a child's federal constitutional right to a safe and secure rehabilitation.

REASON FOR GRANTING THE WRITS

ISSUE: Is a trial judge required to protect the constitutional rights of a 13 year old runaway girl against a state agency which exposes the child to serious physical harm and/or death, and if so, does a trial judge who retains jurisdiction have the right under the 8th and 14th Amendments of the Constitution of the United States to require the committed child to be housed in a safe and secure facility until she is rehabilitated?

In Florida a 13 year old dependent girl has no attorney to look after her constitutional rights. Hundreds of these cases are processed through the Juvenile Court of St. Lucie County each year. This county has a population of about 100,000 people. Any child who constantly runs away from home and otherwise disobeys her parents is a dependent child and must be helped; for not to help the

child is to allow her to be deprived of an education, to go on drugs, to become pregnant, to become another child prostitute, to commit suicide, or to be destroyed wandering around a state full of transients and perverts who are looking for a fresh potential victim.

Is there anything illegal or wrong about a judge looking out for the constitutional rights of a child?

The Florida Legislature by virtue of Chapter 39, and particularly Florida Statute 39.001(2)(b) has, and still is, trying to help children by telling courts to look after a "child's moral, mental, emotional, and physical welfare." Almost all of the employees of HRS want to do this with the exception of those employees who place the prestige of their agency above the welfare of those

they are supposed to serve. "The King can do no wrong" they feel. (A good analogy is the "non acquiese" policy of the IRS in its dealings with its citizens and their courts.) Every "King" since time began has made mistakes and so did HRS in failing to protect this child with a safe environment.

As we all recognize, the Constitution of the United States states that our federal and state government must not inflict "cruel and unusual punishment" upon its citizens. History has provided excellent reasons for this law. Is it not cruel and unusual punishment for a judge to release an unrehabilitated child to go home to commit other additional crimes? Is it not also cruel and unusual punishment for a judge to

commit a child to an institution that the judge knows to be unsafe? The judge must "rule" for he/she cannot put his/her head in the sand and do nothing. Here both the parents and the "HRS grass root employees" consented and/or had no other solution to the problem. Each had been warned a month earlier in a previous hearing that the Court knew of no other alternative and asked for suggestions. Unfortunately none were forthcoming. So when the Court found its own solution "the King" sat back and conducted a "Monday night quarterback session" but still devoid of an alternative solution. Perhaps every "King" should be required to be a "front line soldier" before he orders his soldiers to fight a war. After all, if you want kids to obey their parents and the law you MUST NOT let them thumb their noses at the judge

and get away with it.

The 14th Amendment to the Constitution of the Unites States requires "equal treatment" to each citizen. These are beautiful words. Does not the Constitution of the United States require a safe facility for adult prisoners?

Read Procunier v. Martinez, 416 U.S. 396, 40 L.Ed.2d 224 (1974), where the United States Supreme Court not only took jurisdiction of California inmates' complaints of constitutional rights violations but the United States Supreme Court struck down administrative rules (like HRS) on censorship and rehabilitation. They said in Headnote 4:

> "A policy of judicial restraint with respect to problems of prison administration cannot encompass any failure to take cognizance of valid constitutional

claims whether arising in a federal or state institution and when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."

On Page 412, the court said:

"The identifiable governmental interests at stake in this task are...the maintenance of institutional security against escape..."

In Pugh v. Locke, 406 F.Supp. 318 (1976), the court said in Headnote 3:

"While federal courts continue to recognize broad discretion required for state prison officials to maintain orderly and secure institutions, constitutional deprivations of such magnitude as allow maintenance of facilities that are wholly unfit for human habitation cannot be countenanced, and courts are under a duty to, and will, intervene to protect incarcerated citizens from

such wholesale infringements of their constitutional rights.

Headnote 9, states:

"Content of Eight Amendment is not static but must draw its meaning from evolving standards of decency that mark the progress of a maturing society."

Headnote 12, states:

"Prison officials are under a duty to provide inmates reasonable protection from constant threat of violence."

Headnote 16, states:

"Prisoners are protected by the due process and equal protection clauses of the Fourteenth Amendment and, therefore, must be free from arbitrary and capricious treatment by prison officials."

In Woodhous v. Commonwealth of Virginia, 487 Fed.2d 889 (1973), it was said in Headnote 2:

"Prisoner has constitutional right to be reasonably protected from constant threat of violence and sexual assault by fellow inmates and need not wait until he is actually assaulted to obtain relief."

Although federal courts are reluctant to intervene in the day-to-day operation of state penal systems, it is their duty to protect incarcerated citizens from infringements of their constitutional rights and to intervene in cases where prison officials act in derogation of those rights. Hutto v. Finney, 437 U.S. 678 (1978); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974); Cruz v. Bato, 405 U.S. 319 (1972); Johnson v. Avery, 393 U.S. 483 (1969); Battle v. Anderson, 564 F.2d at 392 (10th Cir. 1977); Bethea v. Crouse, 417 F.2d 504, 506-07 (10th Cir. 1969); Montova v.

Tanksley, 446 F.Supp. 226 (D. Colo. 1978); Smith v. Sullivan, 611 F.2d 1039, 1044 (5th Cir. 1980); Preston v. Thompson, 589 F.2d 300 (7th Cir. 1978). Once the federal courts find an Eighth Amendment violation, they have the duty to use their remedial powers to make their intervention effective. Smith v. Sullivan, 611 F.2d at 1044.

The trial court in this case, having found an Eighth Amendment violation, had considerable discretion to devise a remedy. Preston v. Thompson, 589 F.2d at 30. The law is clear that the court's equitable power to remedy constitutional violations is broad and flexible and must be molded by the facts and necessities of the violation. Hutto v. Finney, 437 U.S.

678 (1978); Milliken v. Bradley, 433 U.S. 267 (1977); Swan v. Charlotte Macklenberg Bd. of Education, 402 U.S. 1 (1971). "To prevent further constitutional deprivations, a court may order forms of relief not normally required by the Constitution but nevertheless necessary given the circumstances if the court's efforts are to be successful." Smith v. Sullivan, 611 F.2d at 1044 (citations omitted). See also Williams v. Edwards, 547 F.2d 1206, 1212 (5th Cir. 1977).

Do the courts discriminate against helpless unrepresented little children by giving adults their right to a safe confinement and denying the right of a "safe confinement" to children? Children need equal treatment and have a constitutional right to equal treatment.

Returning now to the jurisdiction of the Supreme Court of the United States we find in Kent v. United States, 383 US 54[illegible] L ed 2d 84, 86 S Ct 1045, on page 551, this court's admission that jurisdiction does exist when the court stated

> "They also suggest basic issues as to the justifiability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses, particularly where, as here, there is an absence of any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as parens patriae, evidencing the special solicitude for juveniles commanded by the Juvenile Court Act. However, because we remand the case on account of the procedural error with respect to waiver of jurisdiction, we do not pass upon these questions."

CONCLUSION

The issue was:

> Is a trial judge required to protect the constitutional rights of a 13 year old runaway girl against a state agency which exposes the child to serious physical harm and/or death, and if so, does a trial judge have the right under the 8th and 14th Amendments of the Constitution of the United States to require the committed child to be housed in a safe and secure facility until she is rehabilitated?

The foregoing legal material WITHOUT QUESTION establishes a child has a federally protected constitutional right to a safe place of confinement while she is being rehabilitated. (This Judge never told HRS how to rehabilitate the child.) This is an OPEN UNDECIDED question of law. The facts as determined

by the trial court establishes the fact that a temporary secure confinement must be provided for the child who is a serious danger to herself. The decision of the lower courts indicate a misunderstanding of the Constitution of the Unites States and the rulings of the Supreme Court of the United States. This Judge has stuck his neck way out for this kid, which, of course, is irrelevant. What is relevant is that thousands of unrepresented defenseless kids, yesterday, today and tomorrow beg for help from the "mightest court" in the world. Even though you all are grossly overworked, please help the kids and assume the jurisdiction that you have on this open undecided federal question of vital importance to little kids. Their lives are in the hands of each of you -- each of you Justices,

and this author, who after all, were former children and who had others looking after us -- but for thousands of kids less fortunate than you or I; HELP is drastically needed NOW.

For any of the foregoing reasons, the Petition for Writ of Certiorari and/or Prohibition should be granted.

Respectfully submitted,

s/ Philip G. Nourse

PHILIP G. NOURSE,
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Room 309, St. Lucie
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Fort Pierce, Florida
33450
305/464-8904
Authorized to practice
law in the Supreme
Court of the United
States on July 15, 1971

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR ST. LUCIE COUNTY, FLORIDA

IN THE INTEREST OF: JUVENILE DIVISION

Wendy Shaw, a Child. CASE NO. 82-500 CJA

_____/

ORDER OF DISPOSITION, COMMITMENT TO THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

THIS CAUSE having come on to be heard February 3, 1983 and this Court being fully advised from the testimony and information provided, herein makes the following findings:

1. That the above juvenile Wendy Shaw is thirteen years of age.

2. That the said Wendy Shaw is a nice looking, attractive, well-built girl.

3. That she has run away from home 10 times.

4. That she has been declared a dependent and and an ungovernable child on 7-2-82.

5. That she was sentenced to the St. Lucie County Youth Hall for a period of one year on 7-2-82.

6. That the Court later released her on 12-23-82 to her parents at which time she ran away.

7. That, as a result of her behavior she was then placed in the St. Lucie County Youth Hall.

8. That she escaped from the above facility on 12-30-82.

9. That she was apprehended and placed in the Detention Center.

10. That this Court found her in Contempt of Court and Ordered that she serve the balance of the above one year sentence as a dependent and delinquent child at the Alyce D. McPherson School.

11. That Wendy Shaw then advised her parents that she was going to run away from the Ocala School and this Court believes that she will.

12. That this Court was advised that the Alyce D. McPherson school was not a secure facility, its fence having been removed years ago for unknown and unjustified reasons and that a secure facility does not exist in the State of Florida for juvenile girls.

13. That this Court knows of no other secure facility for young runaway girls who are a danger to themselves;

THEREFORE THIS COURT ORDERS AND ADJUDGES that Wendy Shaw be committed to the Department and sent to the Alyce D. McPherson School where

she shall be placed in a secure facility and guarded if necessary until further order of this Court.

FURTHER ORDERED AND ADJDUDGED THAT Mr. David Pingree, Secretary of Health and Rehabilitative Services is hereby ordered to see to it that this girl is confined in a secure facility for whatever time is necessary to rehabilitate her. Any failure to do so will be considered contempt of this Court and if proven punished by fine or imprisonment or both.

ALL CONCERNED PARTIES have thirty (30) days in which to appeal this Order.

THIS ORDER SHALL BE SERVED by the Sheriff of Marion County to the Superintendent of the Alyce D. McPherson School, Mr. William R. Schossler. This Order shall further be served by the Sheriff of Leon County to Mr. David Pingree, Secretary of Health and Rehabilitative Services at 1317 Winewood Boulevard, Tallahassee, Florida 32204.

Jurisdiction in this matter is still retained.

DONE AND ORDERED THIS March 4, 1983, nunc pro tunc as of February 28, 1983.

/s/ Philip G. Nourse
CIRCUIT JUDGE

C

626258

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Harry Lee Anstead, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and the seal of the said Court at West Palm Beach, Florida on this day.

Date: September 30, 1983

Case No. 83-591

County of Origin: St. Lucie

D

TC Case #: 82-500 (CJA) Juvenile

Style: State, ex rel Dept of HRS v.
Hon. Philip Nourse

/s/ Clyde L. Heath
Clerk of the District Court
of Appeal of the State of
Florida, Fourth District

Hon. Roger Poitras, Clerk (Orig)
Hon. Philip G. Nourse, Judge
Steven W. Huss, Esq.
K. C. Collette, Esq.

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA, FOURTH DISTRICT
JULY TERM 1983

STATE OF FLORIDA, ex rel
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,
DAVID PINGREE, CASE NO. 83-591

Petitioners,

vs.

PHILIP G. NOURSE, as Circuit
Court Judge of the Nineteenth
Judicial Circuit, in and for
St. Lucie County, Florida

Respondent. /

E

Opinion filed September 14, 1983

On petition for writ of prohibition
to the Circuit Court for St. Lucie
County; Philip G. Nourse, Judge

Steven W. Huss, Assistant General
Counsel, and K. C. Collette,
District IX Legal Counsel,
Department of Health and Rehabilitative
Services, Tallahassee, for Petitioner

Philip G. Nourse, Respondent,
Fort Pierce.

BERANEK, J.

The Department of Health and Rehabilitative Services seeks prohibition. Although this case is now moot, we shall consider it because of its effect upon the administration of the juvenile system and on similar cases. The trial court ordered the Secretary of Health and Rehabilitative Services to personally confine the juvenile to a secure facility and guard her, if necessary. The court had no jurisdiction to direct a specific placement and treatment of an individual committed to the Department of Health and Rehabilitative Services. State ex rel Department of Health and Rehabilitative Services v. Sepe, 291 So.2d 108 (Fla. 3d DCA 1974). Also see Department of

Health and Rehabilitative Services, Division of Mental Health, South Florida State Hospital v. State, 338 So.2d 220 (Fla. 4th DCA 1976). We note, however, that the Department of Health and Rehabilitative Services did place the juvenile in question in the facility ordered by the trial court, and a short time thereafter advised the trial court that the juvenile had again escaped. This juvenile is 13 years old and has run away from home or escaped from HRS facilities on at least eleven occasions. Both the trial court and HRS have exhibited extreme frustration over these unfortunate events. While the juvenile was in the custody of the Department of Health and Rehabilitative Services, she most recently escaped while on an off-campus visit with her parents. We wish we had the answers. We do not. Prohibition is granted because the court does not have the jurisdiction to manage the details of how the Department of Health and Rehabilitative Services will attempt to rehabilitate juveniles.

PROHIBITION GRANTED.

DOWNEY and HERSEY, JJ., concur.

IN THE SUPREME COURT OF
FLORIDA
FRIDAY, OCTOBER 28, 1983

PHILIP G. NOURSE, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, **

Petitioner, **

vs. ** CASE NO. 64,359

STATE OF FLORIDA, EX REL DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DAVID PINGREE, **

Respondents. **

Upon consideration of the Notice of Appeal and/or Petition for Common Law Writ of Certiorari and/or Petition for Writ of Prohibition, it is ordered by the Court that said Notice and/or Petitions are hereby denied.

BOYD, ACTING C.J., OVERTON, McDONALD, EHRLICH and SHAW, JJ., Concur

cc: Hon. Philip G. Nourse, Judge
Hon. Roger Poitras, Clerk
Hon. Clyde L. Heath, Clerk
Steven W. Huss, Esquire
K. C. Collette, Esquire
Michelle Russell, Esquire

A True Copy
TEST:
/s/ Sid White

Sid J. White
Clerk Supreme Court

H

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October Term, 1983

PHILIP G. NOURSE, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida,

Petitioner,

vs.

STATE OF FLORIDA, EX REL DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DAVID PINGREE,

Respondents.

EMERGENCY SUPPLEMENT OCCASIONED BY A RECENT DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, CORRECTING ITS PREVIOUS LEGAL ERRORS IN THIS MATTER

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EMERGENCY SUPPLEMENT OCCASIONED BY A RECENT DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, CORRECTING ITS PREVIOUS LEGAL ERRORS IN THIS MATTER

Now that the District Court of Appeal, Fourth District, has corrected itself as to the law involved in this matter, comes now PHILIP G. NOURSE, Petitioner herein, and hereby supplements the legal authority previously cited in its Petition.

On December 7, 1983, after the Petition herein was filed in the Supreme Court of the United States, a different three judge panel of the intermediate appellate court (4th DCA) handed down the case of Golstein v. Golstein, Case No. 83-1745, December 7, 1983, a copy of which is set out herein on pp 7.

The previous erroneous three judge court had adjudicated that this trial court (Petitioner) lacked jurisdiction over the "13 year old -- 13 time runaway girl" involved. It has also erred by stating that the trial court lacked authority to protect the federal constitutional rights of this child to see to it that the child's rehabilitation was "safe and secure."

Much to the delight of this Petitioner, in the recent case of a new three judge panel of the District Court of Appeal, Fourth District, in a discussion of a trial court's jurisdiction over a child herein stated:

> "...whenever a minor child resides in this state, a circuit court has inherent jurisdiction to entertain matters pertaining to custody and enter any orders pertaining

> to custody and enter any orders appropriate to that child's welfare. See Cone v. Cone, 62 So.2d 907 (Fla. 1953)." (Emphasis supplied.)

Even more importantly this "enlightened" three judge panel of the 4th DCA quoted the Florida Supreme Court (who apparently overlooked its own precedent on Petitioner's unsuccessful appeal and petition) by stating that:

> "...independent of statute, a court of chancery has inherent jurisdiction to control and protect infants and their property. Id. at 908. Golstein v. Golstein, 4th DCA, Case No. 83-1745, December 7, 1983. (Emphasis supplied.)

As to HRS's "standing smokescreen", Petitioner needs only to point out that it is the Petitioner who is being sued

by HRS -- not Wendy Shaw. It is the Petitioner who is trying to protect the child and her constitutional rights from the "lax and indifferent" HRS. Fortunately, for Wendy, it was not her decapitated skull that was dug up yesterday fifteen miles north of here in an orange grove! It was the skull of another 13 year old runaway girl. (Did HRS's policy allow her to also wander the highways unsupervised?) The point, and bottom line to all of this, is whether or not HRS can successfully challenge a court's duty to protect the federal constitutional rights of a child -- hence standing does exist. Among other things, to hold otherwise would mean that this court is not obligated to enforce a defendant's "Miranda Rights."

SUPPLEMENTAL CONCLUSION

Now that it is obvious that the trial court has inherent (as well as statutory) jurisdiction over children within Florida (irrespective of statutes or HRS rules and regulations) jurisdiction should be accepted by the Supreme Court of the United States for the purpose of settling once and for all the undecided federal question of "safe and secure" rehabilitation of children. Administrators should not be permitted to be both "judge and jury" over children who cannot look after themselves. Notwithstanding the "smoke screen" asserted by HRS, this is the only issue to be resolved. While the Petitioner is unaware of the contents of the Amicus Curiæ Brief being prepared herein by the Attorney ad Litem (Public

Defender) of the child, Petitioner feels sure that he and all 150 million intellectually honest American citizens need and want the Supreme Court of the United States to consider little children now. This problem should be the number one priority for this term of court. All children living in this United States of America regardless of race, religion or sex desperately need your help. Wendy Shaw and other "bull-headed" kids living in our area are like those kids that live in Atlanta -- they live in a three county area where parts of dismembered children are being dug up every day in our local orange groves. Please, we need your help today -- not tomorrow.

Respectfully submitted,

s/ Philip G. Nourse

PHILIP G. NOURSE, Petitioner
Room 309, St. Lucie County Courthouse,
Fort Pierce, Florida 33450
305/464-8904

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH
DISTRICT JULY TERM 1983

DAVID GOLSTEIN,	)	
	)	
Appellant,	)	
v.	)	CASE NO. 83-1745
	)	
SUSAN GOLSTEIN,	)	
	)	
Appellee.	)	
	)	

Opinion filed December 7, 1983

Non-final appeal from the Circuit Court for Broward County; George W. Tedder, Jr., Judge.

Richard G. Bartmon of Anthony J. Schremin, P.A., Miami, for appellant.

Mary Rudd Robinson of Legal Aid Service of Broward County, Inc., Fort Lauderdale, for appellee.

LETTS, J.

A stepfather petitioned for custody of his stepson, but the trial court found it had no jurisdiction to consider the petition. We disagree and reverse.

It is true that the wording of Section 61.13(b) of the Florida Statutes (1981), which refers to the "minor children of the parties," would not appear to envisage or encompass a stepfather absent adoption although the language does not specifically exclude him. However, whenever a minor child resides in this state, a circuit court has inherent jurisdiction to entertain matters pertaining to custody and enter any orders appropriate to that child's welfare. See Cone v. Cone, 62 So.2d 907 (Fla. 1953).

It is also true that the facts of the Cone case reveal involvement of a natural father, rather than a stepfather, yet the language employed in that opinion is overpowering in declaring that "independent of statute, a court of chancery has inherent jurisdiction to

control and protect infants and their property." Id. at 908.

Furthermore, this very court in Heffernan v. Goldman, 256 So.2d 522 (Fla. 4th DCA 1971), upheld the award of custody of two minor children to a stepmother in preference to the natural mother. The Fifth District has likewise approved a custody award to a stepparent. Gorman v. Gorman, 400 So.2d 75 (Fla. 5th DCA 1981).

We therefore reverse the order of the trial judge and remand for further proceedings.

REVERSED AND REMANDED.

BERANEK and HERSEY, JJ., concur.

I HEREBY CERTIFY that an original and forty copies of the foregoing Emergency Supplement Occasioned by a Recent Decision of the District Court of Appeal, Fourth District, Correcting its Previous Legal Errors in this Matter, has been furnished by U.S. Mail this 22nd day of December, 1983, to the Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543; an original and two copies to Harry Lee Anstead, Chief Judge of the District Court of Appeal, Fourth District, P. O. Box A, West Palm Beach, Florida 33401; an original and two copies to Chief Justice James E. Alderman, Supreme Court of the State of Florida, Tallahassee, Florida 32301; one copy to Steven W. Huss, Assistant General Counsel, Department of Health and Rehabilitative Services,

1323 Winewood Blvd., Tallahassee, Florida 32301; K. C. Collette, Department of Health and Rehabilitative Services, 111 Georgia Avenue, West Palm Beach, Florida 33401; Michelle Russell, Assistant State Attorney for the Nineteenth Judicial Circuit, P. O. Drawer 4401, Fort Pierce, Florida 33454; and Abraham J. Gale, Assistant Public Defender for the Nineteenth Judicial Circuit, 111 Atlantic Avenue, Fort Pierce, Florida 33450

s/ Philip G. Nourse

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83-854

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ALEXANDER L. STEVAS,
CLERK

NO.

in the
SUPREME COURT
of the
UNITED STATES

October Term, 1983

PHILIP G. NOURSE, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida,

Petitioner,

vs.

STATE OF FLORIDA, EX REL DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DAVID PINGREE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND/OR PETITION FOR WRIT OF PROHIBITION TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

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QUESTION PRESENTED FOR REVIEW

Pursuant to Rule 34-2, Supreme Court Rules, Respondents state they are dissatisfied with Petitioner's presentation of the Question Presented For Review.

Respondents state the question presented for review is as follows:

> Should the United States Supreme Court assert jurisdiction over a case wherein a State appellate court issued a writ of prohibition against a State trial court for ordering a female juvenile be kept in indefinite and guarded detention, and further ordered that the Secretary of the State social services agency, a non-party, be subject to fine or imprisonment for contempt.

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LIST OF ALL PARTIES TO PROCEEDING

For purposes of the Petition for Writ of Certiorari the parties to this proceeding are Philip G. Nourse, the State of Florida, Department of Health and Rehabilitative Services, and David Pingree.

For purposes of the Petition for Writ of Prohibition, additional parties include the Florida Supreme Court and the Florida Fourth District Court of Appeal.

CITATIONS TO OPINIONS AND JUDGMENTS IN COURTS BELOW

The Orders enumerated on page 1 of Petitioner's brief accurately reflect the Orders at issue in the Courts below.

CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION RESTS

Respondents specifically reject Petitioner's assertion that jurisdiction exists for either the Petition for Writ of Certiorari or Petition for Writ of Prohibition.

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES, ORDINANCES AND REGULATIONS INVOLVED

Respondents reject Petitioner's enumerated Constitutional Provisions and Statute as being not pertinent to this case or supportive of jurisdiction in the United States Supreme Court.

CONCISE STATEMENT OF THE CASE

The Petition for Certiorari/ Prohibition is a request by a State trial court for review of a denial of the State Supreme Court to review a Writ of Prohibition issued to the trial court by a State appellate court. The Writ of Prohibition was issued because the State appellate court determined the trial court entered an order beyond its jurisdiction and in violation of State law. The trial court's order committed a female juvenile to a specific placement in secure confinement under guard, and further placed the Secretary of the State human services agency (Department of Health and Rehabilitative Services [HRS]) in jeopardy of contempt by fine or imprisonment.

The order of the trial court is invalid as a matter of State law. The State Supreme Court has not ruled on any "...title, right, privilege or immunity specifically set up or claimed under the Constitution...of the United States." Thus, there is no jurisdictional basis for the Petition for Certiorari. Nor, is there any basis in law or fact for the issuance of a Writ of Prohibition by the United States Supreme Court.

SUMMARY OF ARGUMENT

The Petition for Certiorari does not establish grounds on which jurisdiction of the Supreme Court can be invoked.

The final judgment or decree at issue is a denial by the Florida Supreme Court of a request for review of a State appellate court order issuing a Writ of Prohibition to a State trial court. The State Supreme Court order denied review without opinion, and without discussion of any Federal question. The State appellate court issued an opinion which based the issuance of the Writ of Prohibition on violation of State law which demonstrated the trial court was acting beyond its jurisdiction. The opinion of the State appellate court dealt only with State law, and did not consider any

substantial Federal question or any right or privilege granted by the United States Constitution.

A review of the entire case does not reveal any substantive issue regarding Federal law or constitutional rights. The United States constitutional provisions identified on page 4 of Petitioner's petition are inapplicable to the present case. The State proceedings have not involved a denial of equal protection or the inflection of cruel and unusual punishment. Petitioner's arguments are without merit.

Further, Petitioner is without standing to challenge the State action because Petitioner alleges violations of constitutional rights of a third party. Because of this Petitioner cannot maintain standing in the Supreme Court.

In addition, grounds do not exist for the issuance of a Writ of Prohibition. With the exception of the trial court, the lower courts have not exceeded their jurisdiction.

ARGUMENT

I.

This case arose when Petitioner/ trial court entered an Order of Disposition, Commitment to the Department of Health and Rehabilitative Services (Order). The Order is dated nunc pro tunc as of February 28, 1983.

It has been contended by Respondents that the trial court exceeded its jurisdiction by the entry of such an order in that it calls for and commands actions and responsibilities on the part of Respondents not permitted, provided for or allowed by State law; that it exercises jurisdiction over Respondents directly or indirectly, who are not parties to the action, nor appropriately before the trial court in such a proceeding; that it attempts to exercise supervisory control over Respondents in violation of State law, and the

basic doctrine of separation of powers as provided for by statute. The Order further directed a specific site of placement and manner of placement for a female child (secure facility and subject to guard).

The Order further assumed jurisdiction over Respondent, David Pingree, without process or notice to Respondent, David Pingree; and places Respondent, David Pingree, in anticipatory contempt and in jeopardy of a finding of contempt resulting in fine and imprisonment, in that he must detain the child in a secure facility for an indefinite period of time.

The Order provides, in one pertinent part, as follows:

> Therefore this Court orders and adjudges that Wendy Shaw be committed to the Department and be placed in a secure facility and guarded, if necessary, until further order of this court. (Emphasis supplied)

It is axiomatic under State law that Petitioner is without jurisdiction to direct the specific placement and treatment of an individual committed to the Department of Health and Rehabilitative Services. State Ex.Rel. Department of Health and Rehabilitative Services v. Sepe, 291 So.2d 108 (Fla. 3rd DCA 1974). In Sepe the Court stated as follows:

> ...by including in the order... mandatory directions to the state agency as to method and duration of treatment, the trial court proceeded without jurisdiction or in excess of jurisdiction; first because the state agency had not been brought in by proper process, and had not been furnished with notice and an opportunity to be heard thereon. See State ex. rel. O'Dare v. Kehoe, Fla. app. 189 So.2d 268. Secondly, such directions to the state agency purport to designate and control the type of duration of treatment of the person committed, accounted to usurping the jurisdiction of the state agency...to thus invade the

functions of the state agency as a division of the executive department is in derogation of the doctrine of the separation of powers of the state government. (Emphasis added)

Thus, the trial court's Order in the instant case is in excess of its jurisdiction and in derogation of the doctrine of the separation of powers of the State government.

Also informative is the case of the Department of Health and Rehabilitative Services, Division of Mental Health, South Florida State Hospital v. State, 338 So.2d 220 (Fla. 4th DCA 1976). In this case HRS, the State hospital and superintendant, were adjudged to be in criminal contempt of a court order. The contempt order was appealed. The contempt order was overturned because the court, citing Sepe, found the Circuit Court was not directed to provide any certain method of treatment.

In addition, Respondents call this Court's attention to the case of State, Department of Health and Rehabilitative Services v. Wade, 363 So.2d 1180 (Fla. 1st DCA 1978). In Wade HRS sought a writ of prohibition to prevent execution of a Circuit Judge's order directing that a criminal defendant be transported to the Florida State Hospital at Chattahoochee for examination to determine whether he was a mentally deranged sex offender. The court held that the Respondent Judge was acting in excess of the court's statutory jurisdiction of asserting authority over HRS.

Also of great importance is the case of Florida Department of Health and Rehabilitative Services v. Crowell, 327 So.2d 115 (Fla. 1st DCA 1976). In Crowell the court found the Circuit Court (juvenile) was without jurisdiction to

exercise supervisory authority over the Department's Division of Youth Services. The Court found the Legislature had provided for juvenile supervision in Chapter 39, F.S. and Chapter 959, F.S.; and this authority did not indicate supervisory jurisdiction by the Court.

Crowell (specifically for juvenile matters), as well as Sepe, State, and Wade, all cited above, stand for the clear proposition that the Circuit Court in the instant case was without jurisdiction to direct the specific placement of the child and the "treatment" (secure detention under guard).

Therefore, the trial court was clearly without jurisdiction or authority to compel Respondents to place the child in mandatory lockup (secure detention) and under guard.

The foregoing provisions of the trial court's Order are:

(1) clearly in excess of its jurisdiction;

(2) clearly violates the dictates of the Florida appellate courts and the cases of Sepe, Wade, State and Crowell;

(3) attempts to exercise jurisdiction, under penalty of imprisonment, over Respondent, David Pingree, when the trial court clearly lacks in personem jurisdiction over Respondent; and no prior notice or opportunity for hearing has been accorded Respondent. The trial court's attempted exercise of jurisdiction over Respondent, David Pingree, was erroneous, was in excess of lawful authority, and without any jurisdictional basis. Respondent, David Pingree, further submits that even if the Court had personem jurisdiction over Respondent's

official capacity as chief executive officer of the Department of Health and Rehabilitative Services, Respondent Pingree could not personally be subject to fine or imprisonment for supervisory functions to be carried out in his official capacity.

II.

None of the State court proceedings involved Federal questions or United States' Constitutional rights arising from state conduct which could serve as a basis to invoke the Supreme Court's jurisdiction. On the contrary, if any United States' Constitutional argument could be made, the argument would be made against the trial court Order which Petitioner seeks to uphold. This Order, in direct contravention of State law, places a female juvenile in

confinement and under guard for an indefinite period. This Order is contrary to the constitutional right of the juvenile to appropriate care and opportunity for rehabilitation. To place the juvenile in indefinite confinement would frustrate any meaningful attempts at rehabilitation. United States' Constitutional infirmities can also be found in the trial court's Order as it relates to Respondent, David Pingree. Pingree, not a party to the trial court's proceedings, was ordered to guard the juvenile if necessary, and failing to do so, subject himself to punishment of fine or imprisonment. This is a clear denial of due process.

Petitioner rests his case on the Fourteenth Amendment to the United States Constitution. In particular, Petitioner cites to equal protection and cruel and unusual punishment.

Petitioner's argument in support of its equal protection assertion is found on page 19 of its petition. There, Petitioner asserts that children and adults are treated differently. This is not a denial of equal protection. Equal protection requires similar people be dealt with in a similar manner and people of different circumstances not be treated as if they were the same. Frost v. Corporation Commission, 278 U.S. 515, (1929); Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 720 (1928). It is obvious that female juveniles and criminal adults are not similar or equal classes. It is clear that attempts to rehabilitate these classes could be at variance without creating a denial of equal protection. The standard of review of State law under the equal protection clause requires only the State

law bear some rational relationship to legitimate State purposes. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, (1973).

Petitioner's argument based on cruel and unusual punishment is equally without basis. Petitioner's argument is that rehabilitation on a training school campus for female juveniles would be cruel and unusual punishment if the rehabilitation was not conducted under guard and in confinement. Such is not the case. The primary purpose of the cruel and unusual punishment clause of the Eighth Amendment is directed at the method of kind of punishment imposed for the violation of criminal statutes. Ingraham v. Wright, 430 U.S. 651 (1977). In the instant case the female juvenile cannot be characterized as a criminal,

nor can her rehabilitation, not under lock and key, be characterized as punishment.

III.

The instant case involves only State law. The United States Supreme Court will not review for Federal error judgments of State courts that rest on undisputed and adequate State grounds. Super Tire Engineering Co. v. McConkle, 550 F.2d 903, cert. denied, 474 U.S. 827 (1977), rehearing denied, 434 U.S. 1025, (1978); Durley v. Mayo, 351 U.S. 277 (1956), rehearing denied, 352 U.S. 895 (1956) ; Dixon v. Duffy, 342 U.S. 33, (1951). Such is the case here. There is no Federal question at issue. The lower court appellate decisions were decided on State law.

The Orders in the lower court establish that a Federal question was not

addressed by the State courts. The United States Supreme Court does not have jurisdiction to review a State court's decision unless it appears affirmatively that a Federal question was presented for decision to the highest court of the State having jurisdiction, that the decision of a Federal question was necessary to determine the cause, that the Federal question was actually decided, or that judgment as rendered could not have been given without deciding it. Southwestern Bell Telephone Co. v. State of Oklahoma, 303 U.S. 206 (1938).

Even if it is assumed that a Federal question was decided, it is clear that it would not be substantial enough to warrant jurisdiction. Honeyman v. Hanan, 300 U.S. 14 (1937); Seaboard Air Line Ry Co. v. Watson, 287 U.S. 86, (1922).

IV.

In this case Petitioner bases constitutional claims on the rights of a third party - a female juvenile. Because of this, Petitioner does not have the requisite standing necessary to obtain jurisdiction in the U.S. Supreme Court. The general rule is that parties may not claim standing in the Supreme Court to address the alleged constitutional rights of a third party or to challenge State action by invoking the rights of others. Barrows v. Jackson, 346 U.S. 249 (1953), rehearing denied, 346 U.S. 841 (1953).

Petitioner states that jurisdiction rests on a "title, right, privilege or immunity specifically set up or claimed." None exists in this case, nor, since Petitioner relies on the rights of a third party, does Petitioner

have the requisite standing to assert such a right. Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Op Marketing Assn., 276 U.S. 71 (1928).

V.

Petitioner has not demonstrated any basis for the issuance of a writ of prohibition by the United States Supreme Court. It is a well-established principle of law that prohibition only lies when a lower court exceeds its jurisdiction. Ex Parte Fassett, 142 U.S. 479 (1892). Petitioner has not demonstrated, or even alleged, that the Fourth District Court of Appeal of the State of Florida, or the Supreme Court of the State of Florida have exceeded their jurisdiction.

Prohibition is an extraordinary writ to be used only for extraordinary causes. Ex Parte Fahley, 332 U.S. 258 (1947). Petitioner has not advanced

any arguments to demonstrate that this cause is an extraordinary cause.

Thus, it is clear that prohibition does not lie in this case.

CONCLUSION

Petitioner's Petition for Writ of Certiorari and/or Prohibition is without merit.

A Writ of Certiorari should not be granted because:

(1) The Order of the Florida Fourth District Court of Appeal issuing a Writ of Prohibition against the Petitioner/ trial court was well-justified;

(2) This case does not involve a substantial Federal question;

(3) This case involves only State law; and

(4) Petitioner does not have standing.

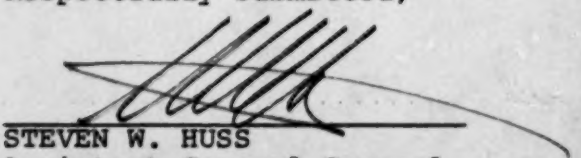
A Writ of Prohibition should not be granted because:

(1) The Appellate Courts of the State of Florida have not exceeded their jurisdiction; and

(2) This cause is not an extraordinary case warranting the issuance of a Writ of Prohibition.

For the above reasons, Respondents respectfully request the United States Supreme Court dismiss and deny the Petition for Writ of Certiorari and/or Prohibition.

Respectfully submitted,



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No. 83-854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PHILIP G. NOURSE, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida,

Petitioner,

vs.

STATE OF FLORIDA, EX REL DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DAVID PINGREE,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION FOR LEAVE TO FILE JURISDICTIONAL BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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Attorney for Amicus

Pursuant to Rule 36.1 of the Supreme Court of the United States, the Attorney Ad Litem herein moves and requests permission from the Court to file the attached Jurisdictional Brief of Amicus Curiae in support of Petitioner. Petitioner's written consent to file this Amicus Curiae is presently on file with the Clerk of Court. Written consent of Respondent was requested herein, but has not yet been received or denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one original and forty copies of Jurisdictional Brief of Amicus Curiae in Support of Petitioner and Motion for Leave to File therein has been furnished by United States Mail this 30th day of December, 1983, to the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543; and that one copy thereof has likewise been furnished to Judge Philip G. Nourse, 19th Judicial Circuit, Room 309, St. Lucie County Courthouse, Ft. Pierce, Florida 33450,; K.C. Collette, Esquire, Department of Health & Rehabilitative Services, 1323 Winewood Boulevard, Tallahassee, Florida 32301; and Michelle Russell, Assistant State Attorney for the 19th Judicial Circuit, Post Office Drawer 4401, Ft. Pierce, Florida 33454.

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OCTOBER TERM, 1983

PHILIP G. NOURSE, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida,

Petitioner,

vs.

STATE OF FLORIDA, EX REL DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DAVID PINGREE,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF AMICUS CURIAE OFFICE OF THE PUBLIC DEFENDER AS ATTORNEY AD LITEM IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Eighth and Fourteenth Amendment to the Constitution compel restricting the liberty of an adjudicated chronic juvenile runaway and command placement in appropriate facilities when that child refuses statutory treatment and rehabilitation and is free to, and continues to, runaway?

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U.S. Const. amend. XIV..... 13

Florida Statutes §39.01(21)..... 4

Florida Statutes §39.071..... 1

INTEREST OF THE PUBLIC DEFENDER AS ATTORNEY AD LITEM

The Office of the Public Defender, which files this brief with the written consent of Petitioner, has a direct interest in this case. The court has appointed this office to serve as attorney ad litem for this indigent juvenile runaway pursuant to Florida Law[1] and this Court's decision in Gault.[2] Therefore, as attorney ad litem, this office is expressly and ethically

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[1] Florida Statute §39.071 provides, inter alia, for appointment of counsel in proceedings relating to juveniles.

[2] In the matter of the application of Paul L. Gault, et. al., 387 US 1, 18 L ed 2d 527, 87 S.Ct. 1428(1967).

obliged and interested to ensure that this chronic juvenile runaway receives proper care, guidance and control which serves her moral, emotional, mental and physical welfare as well as the best interests of the state.

This office also has a generalized interest in this case since it is appointed to represent all indigent juveniles, not only those who chronically runaway, in judicial proceedings before the court where the child's best interest are at issue. Not incidentally, this office is routinely appointed to criminally represent and zealously defend persons accused of acts against children,

such as runaways or abductees, where there is substantial likelihood that the alleged act would not have occurred to children such as Wendy Shaw had the child been receiving treatment, rehabilitation or supervision.[3]

Amici's participation and interest in this case is fundamental, vital, and obvious.

SUMMARY OF THE ARGUMENT

Although the Supreme Court of Florida has long held that Petitioner has inherent jurisdiction to entertain

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[3] E.g., amici has been appointed by the Court to represent the self-confessed killer of Adam Walsh; a case which prompted nation-wide interest and the Congress to pass legislation regarding Runaway and Missing Children during its last session.

matters pertaining to custody and enter any orders appropriate to children's welfare, and that, independent of statute,[4] Petitioner has inherent jurisdiction to control and protect infants, Cone v. Cone, 62 So. 2d 907 (Fla. 1953), the appellate court below refuses to acknowledge the constitutional injury worked upon a chronic juvenile runaway, Wendy Shaw, who repeatedly declines statutory treatment and rehabilitation and continues to runaway at whim. Indeed following the appellate court's writ of prohibition herein, Wendy Shaw, ranaway from the Respondent

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[4]Petitioner's jurisdictional authority to enfore Wendy Shaw's constitutional rights herein derive from Florida Statute §39.01(21) wherein legal custody creates "the right and duty to protect, train, and discipline . . . and to provide . . . food, shelter, education, and ordinary . . . care". (emphasis added).

state agency charged with her treatment and rehabilitation for the eleventh time.

Petitioner and amici contend that the least restrictive alternative available to statutorily treat and rehabilitate an adjudicated chronic juvenile runaway is to minimally restrict her liberty within an appropriate treatment facility when that child continuously refuses to physically remain within the custody and control of the state and further advises that she will continue to runaway.

This Court first recognized in In re Gault, 387 U.S. 1 (1967), that due process considerations attach to children in pretrial juvenile delinquency proceedings which may lead to commitment

in a state institution and must measure up to the essentials of due process and fair treatment. These due process considerations were later extended and applied by this Court to the trial proceedings of juveniles. Kent v. United States, 383 U.S. 541 (1966); In re Winship, 397 U.S. 358 (1970).

Amici asserts that post-adjudicatory rights of juveniles is a question of first impression for the Court and that constitutional due process considerations also legally reach juveniles in post-adjudicatory proceedings when the child's best interests require restraining her liberty and capacity to chronically runaway in order that she may receive care,

guidance and control which serves her moral, emotional, mental and physical welfare as well as the best interest of the state.

It is further alleged that the Eighth Amendment to the United States Constitution prohibits a state agency from habitually placing an adjudicated chronic juvenile runaway in inappropriate facilities which not only permits, but knowingly encourages that child to evade, at whim, the treatment which she requires.

ARGUMENT

I. PLACEMENT OF AN ADJUDICATED CHRONIC JUVENILE RUNAWAY IN INAPPROPRIATE FACILITIES WHICH PERMIT AND ENCOURAGE THAT CHILD TO CONTINUOUSLY ESCAPE AND EVADE STATUTORY TREATMENT AND REHABILITATION VIOLATES THE EIGHTH AMENDMENT.

This Court and lower federal courts have long recognized that the Eighth Amendment applies to the alleged "non-criminal" context of the juvenile process and that juvenile institutions are sufficiently analagous to the criminal setting to deserve constitutional protection. See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977); In re Gault, 387 U.S. 1 (1967); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969); Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975);

Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972), aff'd, 491 F. 2d 352 (7th Cir. 1974) cert.den., 417 U.S. 976 (1974). Indeed, it is clear that children are more deserving of especial protection under the cruel and unusual punishment standard:

> Under the Eighth Amendment children who remain unconvicted of any crime may not be subjected to devastating psychological and reprehensible physical conditions, and while other juvenile cases are not strictly on point, they recognize that juveniles are different and should be treated differently. Thus, the evolving standards of decency that mark the progress of a maturing society require that a more adequate standard of care be provided for pre-trial juvenile detainees.

Swansey v. Elrod, 386 F. Supp. 1138, 1143 (N.D. Ill. 1975); See also, Kent v. United States, 383 U.S. 541 (1966).

Amici contends that the especial protection afforded children in Swansey, supra, and first recognized by this Court in Kent is, at a minimum, at least as applicable to Wendy Shaw's post-adjudicatory treatment and rehabilitation where Wendy, and others, face indifference and neglect by a state agency who unconstitutionally and callously ignores their health, safety and welfare by permitting these children to persistently leave their custody and control at any time.

This Court has specifically refused to countenance such conduct in the post-adjudicatory adult setting when it held that deliberate indifference to medical

and psychological needs violates the Eighth Amendment, Estelle v. Gamble, 429 U.S. 97(1976); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971) and has been followed closely by other courts who, assessing the totality of the conditions, have determined that practices which are "shocking to the conscience of reasonably civilized people" are constitutionally untenable. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970); aff'd, 442 F. 2d 304 (8th Cir. 1971) aff'd sub nom Hutto v. Finney, 437 U.S. 678 (1978). See also, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) aff'd in part and rev'd in part, sub nom., Newman v. Alabama, 559 F.2d. 283 (5th Cir. 1977)

cert. denied, 98 S. Ct. 3144 (1978); Battle v. Anderson, 564 F. 2d 388 (10th Cir. 1977).

By parity of reasoning, unless this Court repudiates its landmark decisions in Gault and Ingraham, supra, and concludes that the Constitution's reach falls short of protecting children at least as equally, if not more so than it does others at the post-adjudicatory stage, it must logically hold that treatment and rehabilitation of children require the physical presence of the child to be constitutionally meaningful.

II. DUE PROCESS REQUIRES RESTRICTING THE PHYSICAL LIBERTY OF AN ADJUDICATED CHRONIC JUVENILE RUNAWAY TO EFFECT STATUTORY TREATMENT WHEN NO LESS RESTRICTIVE REHABILITATIVE ALTERNATIVE IS AVAILABLE WHICH IS REASONABLY RELATED TO THE BEST INTEREST OF THE CHILD.

In evaluating treatment alternatives where fundamental liberty is infringed by the government, this Court established in Shelton v. Tucker, 364 U.S. 479 (1960), that:

> Even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of the . . . abridgement must be viewed in the light of less drastic means of achieving the same basic purpose.

Id. at 488.

Petitioner and amici contend that the statutory, legitimate and substantial interest to treat and rehabilitate an adjudicated chronic runaway child who informs Petitioner that she will continue to runaway, and repeatedly does so despite Petitioner's order, requires protecting the child from her own improvidence and that of others by restricting her physical liberty in order to realistically commence statutory treatment and rehabilitation.

The "right to treatment" has been defined as such treatment "as will give (the individual) . . . a realistic opportunity to be cured or to improve his or her mental condition." Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.

1971) aff'd in part 503 F. 2d 1305 (5th Cir. 1974). It is axiomatic that no realistic opportunity to cure or improve Wendy Shaw's mental condition can exist, whatsoever, without her participation and physical presence throughout the treatment process.[5] Federal and state courts have historically recognized the distinct and fundamental constitutional underpinnings of such due process claims, particularly in the mental health arena.

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[5]Respondent state agency convinced the appellate court below that Petitioner directed the specific placement and treatment of Wendy Shaw contrary to state law and that the Petitioner's order was in derogation of the doctrine of separation of powers. This is factually untrue and legally erroneous. Petitioner ordered Respondent agency to

See e.g., Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974) aff'd, 525 F. 2d 987 (8th Cir. 1975); Rouse v. Cameron, 373 F. 2d 451 (D.C. Cir. 1966), reversed on other grounds, 387 F. 2d 241 (D.C. Cir. 1967); Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974); Renelli v. Dept. of Mental Hygiene, 340 N.Y.S. 2d 498 (1973); Nason v. Superintendent of Bridgewater State Hospital, 353 Mass. 604, 233 N.E. 2d 908 (1968). Since the juvenile process

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provide a "secure" facility for the child upon learning from the agency that the facility it designated to treat Wendy Shaw had removed its fence years ago for unknown and unjustified reasons and that a "secure" facility did not exist in the State of Florida for chronic female juvenile runaways.

Further, Petitioner has never suggested to Respondent state agency how to professionally treat this child. While the child's constitutional rights cry out for attention from this Court, the issue of separation of powers is non-existent.

as well as mental health considerations are similarly based on the parens patriae theory that the state may restrict the liberty interest of individuals for purposes of treatment and rehabilitation, a non-statutory constitutional right to treatment has emerged during the landmark juvenile cases of the 1970's and is now recognized by many lower federal courts. See, Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973) rev'd on other grounds, 562 F.2d 993 (5th Cir. 1977); Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972), aff'd, 491 F. 2d 352 (7th Cir. 1974) cert. denied, 417 U.S. 976 (1974); Martarella v. Kelley, 349 F. Supp. 579(S.D. N.Y. 1972) enforced, 359

F. Supp. 478 (S.D. N.Y. 1973); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1364 (D.R.I. 1972).

If treatment for chronic runaways who, by their recurring status, habitually absent themselves from Petitioner's jurisdiction and the custody and supervision of state treatment agencies is to have meaning, Petitioner and amici request the Supreme Court of the United States to recognize that no less restrictive alternative exists to treat and rehabilitate Wendy Shaw; and that these children have a pronounced constitutional interest in growing-up, healthy, and disappearing into adults and productive citizens of these United States.

CONCLUSION

For the reasons stated above, certiorari is requested from the Supreme Court of the United States.

Respectfully submitted,

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Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

NO. 83-854

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

PHILIP G. NOURSE, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida,

Petitioner,

vs.

STATE OF FLORIDA, EX REL DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DAVID PINGREE,

Respondents.

MOTION IN OPPOSITION TO MOTION TO FILE AMICUS CURIAE BRIEF

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Attorney for Respondents

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Attorney for Respondents

Respondents, State of Florida, Department of Health and Rehabilitative Services, and David Pingree, oppose the Motion for Leave to File Amicus Brief and as grounds therefore state as follows:

(1) Respondent is expressly withholding consent to the filing of the Motion.

(2) The record would demonstrate that the appointment of the Public Defender as Attorney Ad Litem was only done after this case was filed in the Supreme Court. The Public Defender has not participated in these proceedings as Attorney Ad Litem in the State trial court, appellate court or Supreme Court. To Respondent's knowledge, the only efforts made by the Public Defender regarding this case have been the filing of the Motion for Leave to File Amicus Brief, and the Amicus Brief. Although Respondent has requested the Public Defender provide Respondent with documents or

pleadings which generated the need for the appointment for the Attorney Ad Litem, said documents or pleadings have not been produced. Therefore, Respondent is unaware of what facts facilitated the appointment of the Attorney Ad Litem. To this date, the Attorney Ad Litem's efforts on behalf of the juvenile have been to file a motion and amicus brief in support of the Court's position that the juvenile should be incarcerated. It is Respondent's belief that this does not demonstrate the requisite interest necessary for filing an amicus brief in support of the Petition for Certiorari. On the contrary, Respondent suggests thatthe interests of the Public Defender, as Attorney Ad Litem on behalf of the juvenile, would be to impose incarceration.

(3) The Public Defender, as Attorney Ad Litem, states that his office has a generalized interest in this case. It is Respondent's belief that a generalized interest is not sufficient to support the filing of an amicus brief in support of Petition for Certiorari.

(4) Respondent believes that it has clearly established in its earlier filed Brief in Opposition to the Petition for Certiorari, that the petition is without merit and that the Petitioner Judge does not have standing to advance any alleged constitutional rights of the juvenile. Therefore, it appears that the Attorney Ad Litem

would also be precluded from advancing any alleged rights of the juvenile to be incarcerated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion in Opposition to Motion to File Amicus Curiae Brief has been furnished by U.S. Mail this 5th day of January, 1984 to:

Harry Lee Anstead
Chief Judge of the District Court of Appeal
Fourth District
P.O. Box A
West Palm Beach, FL 33401

Chief Justice James E. Alderman
Supreme Court of Florida
Tallahassee, Florida 32301

Judge Philip G. Nourse
19th Judicial Circuit Court
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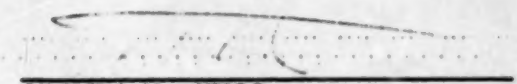
and forty copies of above to:

Clerk of the Supreme Court of the
United States
1 First Street, N.E.
Washington, D.C. 20543



STEVEN W. HUSS